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AVENUE NYC, LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE SUBPOENAS *DUCES TECUM*
AND TO TESTIFY AT DEPOSITION
TO COURTNEY TALLMAN

LIQWD, INC. and OLAPLEX LLC,
Plaintiffs,

vs.

L'ORÉAL USA, INC., L'ORÉAL USA
PRODUCTS, INC., L'ORÉAL USA
S/D, INC. and REDKEN 5TH AVENUE
NYC, LLC,

Defendants.

CASE NO. 2:19-mc-00015-GW-PJWx

Underlying Litigation
Civil Action No. 17-14-JFB-SRF
United States Distr. Del.

Discovery cutoff: January 25, 2019
Pretrial conference date: June 4, 2019
Trial date: July 29, 2019

[DISCOVERY MATTER]

**DEFENDANTS'
SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF MOTION TO COMPEL NON-
PARTY COURTNEY TALLMAN
TO COMPLY WITH SUBPOENA
DUCES TECUM AND TO
TESTIFY AT DEPOSITION**

Date: February 28, 2019
Time: 1:30 p.m.
Dept.: 790
Judge: Hon. Patrick J. Walsh

[Declaration of Serli Polatoglu filed
and served concurrently herewith]

1 L'Oréal USA, Inc., L'Oréal USA Products, Inc., L'Oréal USA S/D, Inc., and
2 Redken 5th Avenue NYC, LLC (together, "L'Oréal USA") submit this
3 supplemental memorandum to briefly address some of the arguments raised by
4 Courtney Tallman ("Tallman") in the Joint Stipulation regarding L'Oréal USA's
5 Motion to Compel Tallman to Comply with Subpoena *Duces Tecum* and to Testify
6 at Deposition (the "Subpoena"). None of Tallman's arguments excuse her failure to
7 comply with the Subpoena, which was served on December 3, 2018. As such,
8 Tallman should be ordered to promptly comply with the Subpoena.

9 Tallman's opposition to L'Oréal USA's Motion rests largely on assertions
10 that the information sought in the Subpoena is irrelevant. This position is
11 unsupported, and gives short shrift to the determination made by the Court in the
12 Underlying Action, *Liqwd, Inc. v. L'Oréal USA, Inc.*, Civil Action No. 17-14-JFB-
13 SRF, that information sought from stylists who used Olaplex's products prior to
14 their public launch is relevant. (*See* Dkt. No. 7-2, Ex. M, ¶ 6.)¹ Tallman is one of
15 those stylists. The Northern District of Illinois reached a similar conclusion when it
16 recently granted L'Oréal USA's Motion to Compel against a similarly situated
17 stylist, Vicki Laris. (*See* Declaration of Serli Polatoglu ("Polatoglu Decl.") filed
18 concurrently herewith, Ex. A and Ex. B at 5:24-6:8.) Tallman's use of the Olaplex
19 products relates to issues of patent invalidity and to defenses to Olaplex's claims
20 for trade secret misappropriation.

21 Tallman also asserts that she should not be ordered to comply with the
22 Subpoena because it is unduly burdensome. This argument has little traction.
23 L'Oréal USA has done all it can to minimize the burden imposed on Tallman. It
24 has repeatedly explained that it does not expect her deposition to last a full day.

25 ¹ The Court in the Underlying Action concluded as much after reviewing three
26 rounds of briefing on this issue (*see* Dkt. No. 7-2, Exs. J-L), belying Tallman's
27 assertion that the court simply "accepted [L'Oréal USA's] conclusory general
28 allegations that the stylists' testimony is 'plainly relevant' to their invalidity
defenses." (Dkt. No. 7-1 at 4.)

1 (*See, e.g.*, Dkt. No. 7-2, Exs. D, H.) It has further narrowed the already-targeted
 2 document requests in the Subpoena. (Dkt. No. 7-1 at 21.) All this notwithstanding,
 3 Tallman has refused to produce a single document responsive to the Subpoena, or
 4 to appear for deposition.

5 While Tallman suggests that some of the information requested in the
 6 Subpoena may also be in the possession of Plaintiffs in the Underlying Action,
 7 Liqwd, Inc. and Olaplex LLC (together, “Olaplex”) (*see* Dkt. No. 7-1 at 43-45),
 8 L’Oréal USA has been hamstrung by Olaplex’s refusal to produce the information.
 9 Moreover, a similar argument was rejected when it was raised by Ms. Laris in the
 10 Northern District of Illinois. (*See* Polatoglu Decl., Ex. B at 5:18-20 (Court: “What
 11 would be L’Oréal’s motivation to take a deposition only to collect information they
 12 have already got? What’s their motivation?”).) L’Oréal USA seeks information
 13 regarding the prior use of Olaplex’s products by the very person who engaged in
 14 that use, whose name has appeared in documents produced by Olaplex.²

15 Any small burden the Subpoena imposes on Tallman does not excuse her
 16 refusal to comply. Indeed, in her Objections to the Subpoena, Tallman represented
 17 that she was unavailable for deposition in December, because December was the
 18 busiest time of the year for her business. (Dkt. No. 7-2, Ex. G at 3). Tallman
 19 makes no similar claims about her schedule at this time of year. In any event, the
 20 standard is not whether discovery will impose a burden, but whether it imposes an
 21 undue burden. Fed. R. Civ. P. 45(d)(1). As the Northern District of Illinois
 22 explained when it ordered Ms. Laris to comply with her subpoena:

23 _____
 24 ² Tallman’s argument that documents responsive to Request for Production No. 2,
 25 which seeks “[a]ll Documents and Communications Concerning the Olaplex
 26 Products, including, but not limited to, Social Media Content, before January
 27 2017,” are equally available to L’Oréal USA, evinces a misunderstanding of the
 28 Request. (Dkt. No. 7-1 at 21, 27.) Many social media platforms, including
 Facebook and Instagram, maintain private groups or messaging features. L’Oréal
 USA would not have access to any posts made by Tallman in these private forums.

1 Compliance with discovery is a nuisance. I agree. And
 2 it's complicated. And when you're a third party, it just
 3 seems like it's not fair. **But the rule of law is really**
 4 **important in the United States**, and it's really important
 5 to me. **And that means that, even though it's**
 6 **inconvenient or difficult or annoying, when you get a**
 7 **subpoena or your testimony is necessary for due**
 8 **process, you cooperate** because we live in a free society
 9 because we all comply with the rules.

10 (Polatoglu Decl., Ex. B at 5:24-6:8 (emphasis added).)

11 Finally, Tallman's contention that L'Oréal USA's Motion is moot has been
 12 laid to rest by the District of Delaware. (Dkt. No. 7-1 at 4, 6, 28.) During a
 13 discovery teleconference held today in the Underlying Action, L'Oréal USA
 14 informed the Court that certain third parties (who are represented by counsel
 15 retained by Olaplex), have objected to discovery on the grounds that the third party
 16 discovery deadline has passed. (*See* Polatoglu Decl., ¶ 3.) The Court made clear
 17 that, if a subpoena was served prior to the original discovery cut-off date
 18 (December 21, 2018), then those third parties must comply with any discovery
 19 order relating to that subpoena. (*Id.*) As an example, the Court referenced the fact
 20 that the Northern District of Illinois just opened discovery for the limited purpose
 21 of Vicki Laris' deposition. (*See* Polatoglu Decl., ¶ 3 and Ex. B at 6:9-15). Tallman
 22 was served with the subpoena on December 3, 2018. (Dkt. No. 7-2, Ex. C.) As
 23 such, Tallman's argument that L'Oréal USA's Motion should be denied because the
 24 discovery cut-off has lapsed is unpersuasive.

25 Tallman has been avoiding her subpoena obligations for nearly three months.
 26 She has conceded that she possesses information responsive to the Subpoena, but
 27 refuses to produce the same. (Dkt. No. 7-1 at 26.) She should not be permitted
 28 evade her discovery obligations any longer. As the Illinois court noted in granting
 a similar motion yesterday, "the rule of law is really important in the United States"
 and "when you get a subpoena or your testimony is necessary for due process, you
 cooperate." (Polatoglu Decl., Ex. B at 6:2-8.) This Court should order Tallman to

1 comply with the Subpoena promptly, and award L'Oréal USA \$2,500, which is
2 only a portion of its fees and costs, for having to bring this Motion. (*See* Polatoglu
3 Decl., ¶ 4.) Fed. R. Civ. P. 37(a)(5)(A).

4
5 DATED: February 14, 2019

PAUL HASTINGS LLP

6
7 By: _____/s/
8 Katherine F. Murray

9 Attorneys for Defendants
10 L'ORÉAL USA, INC., L'ORÉAL USA
11 PRODUCTS, INC., L'ORÉAL USA
12 S/D, INC. and REDKEN 5TH AVENUE
13 NYC, LLC.
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